



**U.S. Citizenship
and Immigration
Services**

**Non-Precedent Decision of the
Administrative Appeals Office**

In Re: 08183694

DATE: DEC. 11, 2020

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for Advanced Degree Professional or Alien of Exceptional Ability

The Petitioner, a company specializing in DNA sequencing and molecular biology, seeks to employ the Beneficiary as a molecular biologist. It requests classification of the Beneficiary under the second preference immigrant category for advanced degree professionals and aliens of exceptional ability. Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2). This employment-based “EB-2” immigrant classification allows a U.S. employer to sponsor a professional with an advanced degree or an alien of exceptional ability for lawful permanent resident status.

The Director of the Nebraska Service Center denied the petition on the ground that the Petitioner did not establish its ability to pay the proffered wage from the priority date of the petition (June 21, 2018) up to the present (the decision was issued on August 21, 2019). On appeal the Petitioner submits additional documentation and asserts that the Director should consider the totality of the Petitioner’s circumstances in determining its ability to pay the proffered wage.

Upon *de novo* review, we will withdraw the Director’s decision and remand the case for further consideration and the issuance of a new decision.

I. LAW

Employment-based immigration generally follows a three-step process. First, an employer obtains an approved labor certification from the U.S. Department of Labor (DOL). *See* section 212(a)(5) of the Act, 8 U.S.C. § 1182(a)(5). By approving the labor certification, the DOL certifies that there are insufficient U.S. workers who are able, willing, qualified, and available for the offered position and that employing a foreign national in the position will not adversely affect the wages and working conditions of domestic workers similarly employed. *See* section 212(a)(5)(A)(i)(I)-(II) of the Act. Second, the employer files an immigrant visa petition with U.S. Citizenship and Immigration Services (USCIS). *See* section 204 of the Act, 8 U.S.C. § 1154. Third, if USCIS approves the petition, the foreign national may apply for an immigrant visa abroad or, if eligible, adjustment of status in the United States. *See* section 245 of the Act, 8 U.S.C. § 1255.

To be eligible for the classification it requests for the beneficiary, a petitioner must establish that it has the ability to pay the proffered wage stated in the labor certification. As provided in the regulation at 8 C.F.R. § 204.5(g)(2):

The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [USCIS].

II. ANALYSIS

As indicated in the above regulation, the Petitioner must establish its continuing ability to pay the proffered wage from the priority date¹ of the petition onward. In this case the proffered wage is \$65,000 per year and the priority date is June 21, 2018.

In determining a petitioner's ability to pay the proffered wage, USCIS first examines whether the beneficiary was employed and paid by the petitioner during the period following the priority date. A petitioner's submission of documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage for the time period in question, when accompanied by a form of evidence required in the regulation at 8 C.F.R. § 204.5(g)(2), may be considered proof of the petitioner's ability to pay the proffered wage.

The record indicates that the Beneficiary's employment with the Petitioner began in 2015 and that in the priority date year of 2018 he received gross pay of \$41,604.79. Since this figure was well below the proffered wage of \$65,000 per year, the Petitioner has not established its continuing ability to pay the proffered wage from the priority date onward based on wages paid to the Beneficiary.

If a petitioner does not establish that it has paid the beneficiary an amount equal to or above the proffered wage from the priority date onward, USCIS will examine the net income and net current asset figures recorded on the petitioner's federal income tax return(s), annual report(s), or audited financial statements(s). If either of these figures, net income or net current assets, equals or exceeds the proffered wage or the difference between the proffered wage and the amount paid to the beneficiary in a given year, the petitioner would ordinarily be considered able to pay the proffered wage during that year.

At the time the Director issued his decision in August 2019 the record included copies of the Petitioner's federal income tax returns for 2017 and earlier years, but not for 2018 because that return had not yet been filed. In denying the petition the Director noted that the 2017 federal income tax

¹ The "priority date" of an employment-based immigrant petition is the date the underlying labor certification is filed with the DOL. *See* 8 C.F.R. § 204.5(d).

return showed a net loss and net current liabilities for that year. The Director also analyzed other documentation not among the three types of required evidence specified in 8 C.F.R. § 204.5(g)(2). The Director concluded that the evidence of record did not establish the Petitioner's ability to pay the proffered wage from the priority date up to the present.

The Petitioner filed a timely appeal in September 2019 supported by a brief and additional documentation, including a copy of its federal income tax return for 2018 which had just been filed. Since a regulatory required document for the priority date year of 2018 is now in the record, we will remand this case for consideration of the Petitioner's 2018 federal income tax return along with the other documentation submitted on appeal and the arguments presented in the brief, including the Petitioner's citation of the federal appeals court decision in *Construction and Design v. U.S.C.I.S.*, 563 F.3d 593 (7th Cir. 2009). To further supplement the record the Director may request that the Petitioner submit a copy of its 2019 federal income tax return, which should now be available, as well as later pay evidence such as a 2019 W-2 or final 2019 pay stub to exhibit wages paid. The Director may also consider the totality of the Petitioner's circumstances, consistent with the factors discussed in *Matter of Sonogawa*, 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967), in determining the Petitioner's ability to pay the proffered wage from the priority date onward.

Finally, USCIS records indicate that the Petitioner has filed a second I-140 petition on behalf of another beneficiary. When a petitioner files other I-140 petitions it must establish that its job offer is realistic not only for the instant beneficiary, but also for its other I-140 beneficiaries. Accordingly, the Petitioner in this case must demonstrate its ability to pay the combined proffered wages of the instant beneficiary and every other I-140 beneficiary from the priority date of the instant petition until the other I-140 beneficiaries obtain lawful permanent resident status. *See Patel v. Johnson*, 2 F.Supp. 3d 108, 124 (D.Mass. 2014) (upholding our denial of a petition where a petitioner did not demonstrate its ability to pay multiple beneficiaries).²

III. CONCLUSION

For the reasons discussed above, we will remand this case to the Director for further consideration of the Petitioner's ability to pay the proffered wage from the priority date of June 21, 2018, onward.

ORDER: The Director's decision is withdrawn. The matter is remanded for the entry of a new decision consistent with the foregoing analysis.

² The Petitioner's ability to pay the proffered wage of one of the other I-140 beneficiaries is not considered:

- After the other beneficiary obtains lawful permanent residence;
- If an I-140 petition filed on behalf of the other beneficiary has been withdrawn, revoked, or denied without a pending appeal or motion; or
- Before the priority date of the I-140 petition filed on behalf of the other beneficiary.